IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 468 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAMESHBHAI GHANDABHAI CHAUHAN

Versus

STATE OF GUJARAT

Appearance:

MR DEEPAK M SHAH for Appellant

Mr.Kamal Mehta, ADDL.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 06/03/98

ORAL JUDGEMENT (S.M.Soni J.)

Appellant - orig. accused in Sessions Case No.206 of 1990, is found guilty of an offence punishable under section 302 of I.P.C. and is sentenced to R.I. for life by learned Addl. Sessions Judge, Nadiad by his judgment and order dated 23.5.91. Against this judgment

and order, the present appeal is filed.

Facts, which led to the prosecution of the appellant ("accused" for short) are as under:-

Deceased Kalabhai and his cousins, P.W.1 and P.W. 2, are the ordinary residents in the sim of village Malataj, Taluka Mehmedabad. Accused Rameshbhai is also a resident of that village. On 20.8.90, P.W. 1 Surabhai and P.W. 2 Kanubhai had gone to Malataj village to sell milk. Deceased Kalabhai had also accompanied, as he wanted to purchase some grocery. When they were returning back, they reached near the sign-board on the road to Malataj. At that time, accused was standing near the distribution pole of electricity. Deceased was just behind P.W.1 and P.W.2. At that time, accused came from behind, caught hold of deceased Kalabhai by hair and inflicted knife blow on the chest. Deceased Kalabhai fell down. P.W.1 and P.W. 2 bodily lifted him to carry him to their house, but they found him dead on the way. Therefore, the body of Kalabhai was placed at the shop of Budhabhai. P.W.1 went to the field to call the father of the deceased and then they went to Mehmedabad Police Station and gave a complaint. On receipt of the complaint, offence was registered and on completion of the investigation, accused was chargesheeted in the court of J.M.F.C., Mehmedabad, who, in his turn, committed the case to the court of Sessions.

The learned Additional Sessions Judge framed charge against the accused. Accused pleaded not guilty and claimed to be tried. On completion of the trial, learned Additional Sessions Judge found the accused guilty of offence referred above and sentenced him to suffer R.I. for life. This judgment and order is assailed in this appeal.

Learned Advocate Mr.D.M.Shah for the accused has contended that the learned Addl. Sessions Judge has erred in accepting the evidence of P.W.1 and P.W. 2, who purports them to be eye witnesses. In fact, on proper reading of their evidence, only inference which can be drawn is that they have not seen the incident. Mr.Shah also contended that at the time of incident, there would be no sufficient light to identify the assailant, assuming that they were present there. Mr.Shah also contended that the say of P.W.1 and P.W. 2, who are closely related persons of the deceased, are not corroborated by the independent evidence, such as medical evidence. Mr.Shah also contended that the conduct of these witnesses appears to be most unnatural, inasmuch as when they were carrying the injured to their home, as he died he was left on the ota of shop of someone in the village instead of carrying him to home. Mr. Shah, therefore, contended that from all these facts, only

inference that can be drawn is that they were not present at the time of incident and they have seen nothing in the matter.

Mr.Mehta supports the judgment of learned Addl. Sessions Judge. Mr.Mehta contends that there is an electric pole at a distance of 108 ft., from the light of which one can very easily see the assailant and they have seen the assailant. He further contended that even in a defused light, assailant could have been identified by them, as he is a known person of the village. Mr.Mehta further contended that there is an independent piece of evidence inasmuch as the clothes of the accused are found stained with human blood and of the group of the deceased. Mr.Mehta also contended that the evidence of P.W.1 and P.W.2 is in fact corroborated by the medical evidence. Mr.Mehta contended that the medical evidence supports the substantive evidence of the witnesses. Mr.Mehta, therefore, contended that the judgment of the learned Addl. Sessions Judge be confirmed.

To appreciate the diverse contentions of the learned Advocates, it will be relevant to refer to the evidence of Surabhai P.W.1. P.W.1 is the real uncle of the deceased and P.W. 2 is the cousin of the deceased. P.W.1, uncle of the deceased, has stated that in the evening of 20.8.90 at about 7.00 P.M. they were returning back to their field, after selling milk. Along with him, P.W.2 Kanubhai and deceased Kalabhai were there. When they reached near the sign-board showing Sedara - Malataj road, accused was at D.P. (distribution point of electric supply), deceased was just behind them. Accused came there, caught hold the deceased by hair of the head and inflicted knife blows on the chest and heart and accordingly three blows were given. Accused ran away after inflicting the blows. He had given one blow near the shoulder. Thereafter they lifted the deceased bodily and brought near the shop of Budhabhai. Leaving Kalabhai dead at the otta of the shop of Budhabhai, they went to their field. He then informed his uncle, father of the deceased. This witness, in his cross-examination, has admitted that it was a dark night. He understands the difference between chapu (knife); katari (dragger) and chari. He admits that he could not see properly whether the weapon was either chapu or chari. He has referred the weapon as chapu in his complaint. He has shown ignorance to what grocery was purchased by Kalabhai. However, he states that at that time Kalabhai had no grocery with him. He also admits that it is not true that nothing has happened at D.P. He also admits that milk society is adjoining to the shop of Budhabhai. He denies to have gone at the place where Kalabhai was lying afterwards from milk society. He also admits that in the

complaint he has not referred to three blows. He has also not stated in the complaint that one blow was given on the shoulder and two in the chest. He admits that accused may have come from opposite side and was standing near D.P. Evidence of this witness P.W.1 if we test from the other independent evidence on record as well as his own cross-examination, it does not create confidence. Firstly, in his complaint he has referred that all the three i.e. P.W.1, P.W.2 and deceased, were returning to their field by about 7.30 in the evening and when they reached near the sign-board at about 8.00 PM, accused was standing near D.P. He came running and caught his nephew by hair of head and with the other hand, gave a chapu blow in the chest. Kalubhai fell down on the ground and accused ran away with Chapu. First thing to be considered is that if they found accused coming from D.P., which is shown to be at 90 ft. away from the scene of offence in the map Ex.22, it is surprising why for all the time these two witnesses, in particular P.W.1, simply onlooked the accused coming, catching hold of the deceased by hair of head and inflicting injury. Neither deceased is shown to have resisted or struggled nor P.W.1 or P.W.2 have tried to intervene. This conduct of P.W.1 and P.W. 2 and even that of the deceased as told by P.W.1 and P.W.2, appears to be most unnatural. If a man is caught by hair of head and with the other hand if a blow is given, then before the blow is given at least the victim would try to save himself or struggle to ward off the blow that may be given to him. At the point of time when both the hands of the accused were engaged, one in giving blow and other in catching hold of the deceased, P.W.1 and P.W.2, who were present there, at least could have tried to save the deceased or may have escorted the deceased in one way or the other. This inaction on the part of P.W. 1, in our opinion, makes his evidence incredible. Apart from this, after the injured fell down, they allowed the accused to run away and they lifted bodily the injured and went towards their field. While on the way to their field when they found that injured is dead, they left the dead body at the ota of the shop of Budhabhai and again went to the field to inform the father of the deceased. This conduct also, in our opinion, is most unnatural. If the injured was lifted from the scene of offence to be carried or taken to home in the field, there was no reason for them even if the injured has died to leave him on the ota of someone in the village and then go to the filed alone and bring the other relations to the ota. Otherwise also, the injured was required to be taken home as per the community custom. This conduct of these witnesses also appears to be most unnatural. P.W.1 has stated that he

and P.W.2 had gone to sell the milk and deceased has gone to purchase grocery. If deceased has gone to purchase grocery, then, when he came back, it may be that P.W.1 may not know what grocery he has purchased, but at least grocery must have been found at the scene of offence. However, nothing has been found and P.W.1 has specifically stated that deceased had no grocery with him. Question is: when deceased has gone to purchase grocery and has come back, where the grocery has gone ?

In the complaint P.W.1 has stated that only one blow was given while before the court he has referred to three blows, one on the chest; other on the heart and third near the shoulder. If one looks at the inquest report, ex.13, it refers to only two injuries. P.M. note at Ex.10 refers to as many as four injuries, one on the head, second on the chest, third on the right shoulder joint and fourth on the sternums left side. As many as three injuries are there on the chest portion of the deceased. If P.W. 1 has seen accused giving blow on the deceased, then he must have seen accused giving four blows, which are found in the medical evidence. Despite the same, he refers to only one blow and then he says that the accused immediately ran away. This suggests that P.W. 1 may not have seen accused inflicting blow on the deceased. Admittedly, it was a dark night. Time of the incident, as stated by P.W.1 is 7.00 to 7.30 PM. In the map at Ex.22, electric pole is shown at a distance of 108 ft. from the scene of offence. In our opinion, that electric pole would not be providing sufficient light to identify the person, who comes all of a sudden at the scene of offence and that too, from the opposite direction. It is not the case of P.W.1 that on seeing the accused assaulting the deceased, they shouted or intervened either to save the victim or to call for the help of the victim. This conduct also, in our opinion, is not a natural one. Cumulative effect of all this is that it creates doubt whether P.W. 1 was either present there at the time of incident or has seen the commission of the offence, as alleged by him.

Prosecution has also examined Kanubhai P.W.2, who is the first cousin of the deceased. Evidence of P.W. 2 also suffers from the same infirmities. However, in his evidence, he states that deceased had come with grocery of tea and sugar. P.W. 1 says that deceased has not come with grocery. P.W. 2 says that deceased has come with tea and sugar and scene of offence does not show presence of even a container for grocery, muchless tea or sugar. P.W. 2 refers the time as 8.00 PM.

Immediately after the incident, Police has come at the scene of offence at about 11.00 PM and thereafter the statement of this witnesses is recorded. It is in

the evidence of P.W. 11 Mayudan. He has first gone after recording the complaint to the scene of offence. He has then recorded the statement of witness Kanubhai. However, P.W. 2 says that his statement was recorded on the next day. In the early morning of the next day, inquest panchnama was drawn. In the said inquest panchnama, panchas are able to notice only two injuries on the person and thereafter the dead body was sent to Hospital for autopsy. Autopsy was over at about 11.30 AM. If we read the inquest panchnama, it will be relevant to observe that the earth had struck the face of the dead body; mouth was open; earth was in the mouth. Thus, it appears that the statement of this witness P.W.2 must have been recorded after Post-mortem examination was over. This inference can be safely drawn for the reason that inquest panchnama is drawn between 7.00 and 7.45 A.M. on 21.8.90. Then panchnama of the scene of offence is drawn between 9.00 and 10.00 A.M. Panchnama of the cloth of the deceased received after post-mortem is drawn between 11.45 and 12.05. The accused is also arrested and his clothes are seized between 11.45 and 12.15. Investigating Officer must be busy during the intervening period for making necessary arrangement for calling panchas, sending the dead body for post-mortem examination,etc. Therefore, when P.W. 2 himself has stated that his statement was recorded by the Police on the next day, it cannot be ruled out that it must have been recorded after post-mortem examination was over and in the post-mortem examination when there are as many as four injuries found, that might have been reflected in his statement. When P.W.2 and P.W.1 have simultaneously witnessed the incident, when they were present at the time when the incident took place, yet in the complaint P.W.1 has referred to one blow while P.W. 2 refers to four blows in the oral evidence before the court. How could it happen that complaint refers to one blow and the substantive evidence before the court refers to four blows ? This improvement, in our opinion, is nothing, but with a view to make their evidence consistent with the medical evidence. This, on the contrary, reflects on the credibility of their evidence and makes their evidence more doubtful than it could be.

Thus, evidence of P.W. 1 and P.W.2 does not inspire confidence. P.W. 1 is the real uncle and P.W. 2 is the first cousin of the deceased. When they were together and deceased was assaulted, non-interferance even with a view to save him or rescue him suggests that they may not be present at the time of incident. Whether there was sufficient light or not becomes insignificant when their presence at the scene of offence is doubtful one.

Question may arise as to why this accused is named ? Prosecution witnesses, more particularly relatives, will not rope in an innocent person and allow a real culprit to go. This is true when a real culprit is known. P.W. 1 and P.W.2 have only found the deceased lying near the sign-board and that place is shown to be the scene of offence. They must have reached there after the incident is over. They must have guessed that the accused must be the person who must have assaulted the deceased because of alleged motive made out in the case. When evidence of P.W.1 and P.W. 2 is suspicious, not cogent, not corroborated by independent evidence, their evidence is doubtful and it will be hazardous to rely on their evidence. In view of these facts, accused must be entitled to the benefit of doubt and the prosecution has failed to prove beyond reasonable doubt that it is the accused who has committed this act. The learned Judge has committed an error in accepting the evidence of these two witnesses, on whose evidence the conviction is based.

In the result, the appeal is allowed. The judgment and order of conviction and sentence is set aside. Appellant - accused be set at liberty forthwith, if not required in any other case.
